IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARC VEASEY, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 2:13-cv-193 (NGR)
UNITED STATES OF AMERICA, Plaintiff, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Plaintiff-Intervenors, TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS, *et al.*, Plaintiff-Intervenors, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 2:13-cv-263 (NGR)

TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Plaintiffs, v. NANDITA BERRY, *et al.*, Defendants.	Civil Action No. 2:13-cv-291 (NGR)
BELINDA ORTIZ, *et al.*, Plaintiffs, v. STATE OF TEXAS, *et al.*, Defendants	Civil Action No. 2:13-cv-348 (NGR)

JOINT ADDITIONAL SUPPLEMENTAL BRIEF BY ALL PRIVATE PLAINTIFFS AND PLAINTIFF-INTERVENORS IN SUPPORT OF UNITED STATES' MOTION TO COMPEL THE PRODUCTION OF LEGISLATIVE DOCUMENTS

This additional supplemental brief is submitted jointly by all private Plaintiffs and Plaintiff-Intervenors in this consolidated litigation in support of the United States' motion to compel the production of legislative documents (Doc. 162). This brief addresses the threshold question of whether the United States properly has sought the production of certain legislative documents from Texas pursuant to Rule 34 of the Federal Rules of Civil Procedure.

For the following reasons, production is properly sought under Rule 34, and this Court, accordingly, should reject Texas' assertion that the documents only may be sought through the issuance of non-party subpoenas under Rule 45. Therefore, this Court should proceed with ruling on the two privilege claims (legislative privilege and attorney-client privilege) made by

Texas, and should reject these contentions on the merits for the reasons set forth in the briefs previously submitted by the private Plaintiffs and Plaintiff-Intervenors (Doc. 182), and the United States (Docs. 162 and 189).

1. As a preliminary matter, while some Texas legislators have decided to waive legislative privilege and/or attorney-client privilege, and some others may do so, this does not meaningfully narrow the current dispute. The sponsors of SB 14, and other members of the Legislature who played key roles in SB 14's adoption, all have asserted the two privileges, and it is the legislative documents that involve these legislators that are at the heart of the current discovery dispute. Among the legislative documents at issue, it is the documents involving the sponsors and the key legislative players that are most likely to be probative of the Legislature's purpose in enacting SB 14. *See, e.g.*, *Florida v. United States*, 885 F. Supp. 2d 299, 354 (D.D.C. 2012); *Busbee v. Smith*, 549 F. Supp. 494, 500-02, 508, 516-18 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). Accordingly, there clearly is a live, ripe dispute with respect to the production of important legislative documents.

2. Rule 34 provides that the United States may request from Texas any and all documents "within the scope of Rule 26(b)" so long as the documents are in Texas' "possession, custody, or control." *See generally* Charles Alan Wright & Arthur R. Miller, et al., Federal Practice & Procedure § 2210 (3rd ed.). Thus, putting aside Texas' mistaken claim that these documents are not relevant (and therefore, allegedly, not "within the scope of Rule 26(b)"), this Court clearly may rule on the privilege issues, and compel production, provided that Texas has in its "possession, custody, or control" documents requested by the United States.

Contrary to Texas' argument, the Rule 34 "possession, custody, or control" determination does not turn on – and is unrelated to – the issue of whether the qualified legislative privilege

(however defined) belongs to individual legislators. There is no exception in Rule 34 for documents that are within a party's "possession, custody, or control" and that, in addition, may be the subject of a privilege claim by a non-party. *See In re Bankers Trust* Co., 61 F.3d 465, 469 (6th Cir. 1995) ("parties in possession of documents forwarded to them by a [non-party] have 'possession, custody or control' within the meaning of Rule 34, notwithstanding the fact that the [non-party] . . . retains ownership and restricts disclosure"); *id.* at 471-72 (ruling by the Sixth Circuit, under Rule 34, regarding the qualified privilege asserted on behalf of the non-party owner of the requested documents).

Instead, if individual legislators are the ones who possess a qualified privilege, that only goes to the question whether legislators asserting privilege should be allowed an opportunity to be heard on the pending motion to compel. But these legislators – or at least a substantial number of them – already have been heard on the motion. As the Texas Attorney General's Office has advised this Court, that office represents at least 77 of the legislators who claim privilege, including the sponsors of SB 14 and other key legislators involved in SB 14's enactment. Moreover, at the Court's direction, the Attorney General's Office sent a follow-up letter to other legislators regarding the privilege issue on March 7, 2014, and any additional legislators who respond by claiming privilege also may request that the Attorney General's Office represent them in defending the motion to compel.[1]

For these reasons, the Court need not decide whether the qualified legislative privilege is held by individual legislators and/or by the State of Texas in ruling on the motion to compel.

[1] The Court may require Texas to provide a final list of the legislators it represents after the March 21 deadline passes for legislators to respond to the March 7 letter. If any legislators respond by indicating that they want to assert a privilege but do not want to be represented by the Attorney General's Office – and if this Court rejects the privilege claims made by the legislators who are represented by that Office – the parties, with the Court's assistance, may then develop a procedure for addressing the privilege claims of these remaining legislators.

3. Texas has in its "possession, custody, or control" legislative documents sought by the United States.

a. At the outset, Texas has conceded that at least a portion of the documents at issue satisfy the Rule 34 requirement. In its Rule 26 Initial Disclosures (Doc. 162-2), the State acknowledged that "[t]he State of Texas has in its possession but did not produce documents believed to be privileged and identified in privilege logs."

b. Moreover, it is clear that at least a portion of the documents are in the "possession, custody, or control" of the State of Texas because they are in the "possession, custody, or control" of the Texas Legislature. These documents include emails transmitted through the email server run by the Texas Legislature, documents produced or received by the Texas Legislative Council (an arm of the Legislature), documents produced or received by legislative committees and committee staff, and documents produced or received by staff members who worked for the Legislature and not an individual legislator.

For the purposes of this litigation, there is no question but that the State of Texas (a named Defendant) includes the Texas Legislature. The Texas Constitution provides that: "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another." Texas Const., Art. 2, § 1. This lawsuit is about the exercise of "[t]he powers of the Government of the State of Texas" by two of those departments, the Legislative and Executive. Thus, suing "Texas" regarding the enactment and implementation of SB 14 necessarily means that the Texas Legislature is a party.

Texas claims, implausibly, that the Texas Legislature merely has a third-party relationship with this litigation. But the caselaw cited by the State discussed the substantive question whether individual state legislators were properly asserting legislative privilege, and did address the question whether a "State" includes its state legislature when the State is sued regarding legislation enacted by that legislature. Defendants' Response to Private Plaintiffs' and Plaintiff-Intervenors' Supplemental Brief, at 2-3 (citing *Alabama Educ. Ass'n v. Bentley*, 2013 WL 124306, at *12 (N.D. Ala. Jan. 3, 2013), and *Florida v. United States*, 886 F. Supp. 2d 1301 (N.D. Fla. 2012)).

c. It is of no consequence that some documents at issue may have been turned over by the Legislature to the Texas Attorney General's Office. Plainly, a party may not turn over documents to its attorney and then claim that Rule 34 does not apply for that reason.

d. In addition, a separate and independent reason for relying upon Rule 34 is that the Texas Attorney General's Office has "possession, custody, or control" over the documents at issue. The Attorney General's Office is part of the State's Executive department, Texas Const., Art. 4, § 1 ("The Executive Department of the State shall consist of … an[] Attorney General"), and thus, for purposes of discovery, that Office may be treated as a party to this litigation.

4. Finally, there is no indication that the Court needs to engage in an in-camera review of individual documents as part of ruling on the motion to compel. The privilege arguments made by Texas in its briefs and at the March 5 hearing do not raise any issues unique to particular legislators or particular documents. Instead, Texas has presented the same arguments on behalf of all legislators it represents as to all documents at issue. That said, as Plaintiffs and Plaintiff-Intervenors have previously suggested (Doc. 182, at 12-14), the

documents that are produced may be designated "Highly Confidential" under the Protective Order entered in this case (Doc. 105), and any separate issues that might arise as to individual documents may addressed at trial if and when the documents are offered into evidence.

For these reasons, the United States has properly sought legislative documents from Texas under Rule 34, and this Court should proceed to rule on the pending motion to compel. That ruling, by resolving – at least to some substantial degree – the outstanding questions of legislative privilege and attorney-client privilege, will pave the way for the parties to proceed with discovery, both with regard to the production of documents and also with regard to the taking of depositions. Even if there are some legislative documents that are only obtainable by subpoena under Rule 45, the guidance provided by this Court in ruling on the motion to compel would significantly narrow, if not essentially resolve, any privilege issues that might arise in a motion to enforce or quash those subpoenas.

In short, the practical way to get the privilege issues resolved and to move this litigation forward is for this Court to take a step-by-step approach. The first step is ruling on the privilege issues asserted by Texas as to those documents that are in the State's "possession, custody, or control" and which involve the legislators represented by the Texas Attorney General's Office.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2014, I served a true and correct copy of the foregoing via the Court's ECF system on all counsel of record.

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